No. 15-777

IN THE

Supreme Court of the United States

JAN 15 2016

SAMSUNG ELECTRONICS CO, LTD, ET AL.,
Petitioners,

v.

APPLE INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* THE HISPANIC LEADERSHIP FUND, THE NATIONAL BLACK CHAMBER OF COMMERCE, AND THE NATIONAL GRANGE OF THE ORDER OF THE PATRONS OF HUSBANDRY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are nonprofit, nonpartisan groups that represent communities that are marginalized in American society by numerous factors, including racial discrimination, poverty, cultural and language barriers, and geographic isolation.

The Hispanic Leadership Fund is dedicated to strengthening working families by promoting common-sense public policy solutions that foster liberty, opportunity, and prosperity, with a particular interest in issues affecting the Hispanic community.

The National Black Chamber of Commerce seeks the economic empowerment of African-American communities through entrepreneurship. It advocates for all 2.4 million African-American-owned businesses in the United States and the communities they serve.

The National Grange of the Order of the Patrons of Husbandry is a dedicated fraternal organization that has championed America's farmers, ranchers, and other rural residents for nearly 150 years.

Amici are deeply concerned that the outcome of this case could adversely impact the social and economic welfare of the communities they represent for years to come. Entrepreneurs from these communities depend upon the ability to fairly compete in open, competitive markets in order to overcome historic difficulties that have hampered their chances of succeeding in the

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[1] Counsel for all parties received notice of *amici curiae's* intent to file this brief 10 days before its due date. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

American marketplace. And millions of minority and rural Americans rely upon affordable smartphones as their only practical means to access the Internet.

The exorbitant design-patent damages permitted under the Federal Circuit's interpretation of Section 289 of the Patent Act threatens these communities on both of these fronts. It will make it harder for minority and rural entrepreneurs to create and develop businesses, thereby hindering their ability to empower themselves and their communities. It also risks making it unaffordable for millions of low-income, rural, and minority Americans to obtain Internet access, an indispensable tool for social and economic mobility in the United States.

SUMMARY OF THE ARGUMENT

The Federal Circuit's interpretation of Section 289 of the Patent Act permits design-patent holders to recover all of the profits earned on infringing products, even for designs that cover only a small part of a product, or contribute little to the product's overall value. Pet. App. 27a-29a. This will result in awards that drastically overcompensate design-patent holders for the inventive contribution embodied in a design patent, and for this reason alone, this Court's review is warranted. But the availability of absurdly excessive damages permitted under the Federal Circuit's decision will also foster competition-inhibiting incentives that will have a wide-ranging impact. And, as in so many other areas of American life, these adverse effects will fall hardest on those who have the least, including the low-income, minority, and rural Americans *amici* represent, whose social and economic progress is already hampered by a host of other disadvantages.

The Federal Circuit's decision will make it harder for entrepreneurs from these communities to start and develop businesses, even if they make every effort to avoid infringing others' patents. If the Federal Circuit's interpretation of Section 289 stands, design patents could be wielded as potent weapons that would enable design-patent holders to extract excessive royalties and inhibit rivals' ability to fairly compete against them. These threats (and the disabling fear of unwitting infringement they would produce) are likely to harm many small businesses, as Samsung warned in its petition, at 38, making it harder for them to compete in a wide swath of industries, from high-tech consumer electronics to heavy farming equipment. But they could prove to be a special burden for entrepreneurs from minority and rural communities—and not just because the businesses owned by these entrepreneurs tend to be small.

Threats of dramatically excessive design patent damages would also compound historic difficulties that entrepreneurs from these communities have long experienced in the American marketplace, which leave them especially dependent upon open, competitive markets to succeed, and make them particularly vulnerable to anti-competitive threats from design-patent holders. The stakes are also much higher for minority-owned and rural businesses, because jobs, opportunities, and progress for their marginalized communities all depend upon their success.

Total-profit disgorgement awards could also harm individuals from the communities *amici* represent by depriving them of the life-altering benefits of Internet access due to forces beyond their control. The competition-destroying incentives these awards will foster will likely cause smartphone prices to rise,

because the smartphone industry is packed with design patents. This, of course, would harm all consumers who wish to purchase smartphones. But the consequences could prove debilitating for millions in minority and rural communities, who depend on affordable smartphones as their only practical means of obtaining Internet access, a vital tool for success in the twenty-first century.

For millions in these communities, barriers of cost, culture, language—and for some, a dearth of basic Internet infrastructure—have all conspired to make Internet access unattainable. This Internet exclusion heaps burdens on the unconnected in these communities, atop other obstacles placed on them by race, culture, and geography—one more force impeding their progress.

Affordable smartphones have proven irreplaceable in enabling individuals in these communities to begin to overcome this barrier, providing a means for Internet access to many who would otherwise not be able to afford it. This increased connectivity has measurably improved the lives of those that have been able to connect. But for many from these communities, financial pressures make their connection to the Internet extremely tenuous. And for others, these same constraints keep Internet access out of reach entirely. For these people, the decreased competition and increased smartphone prices likely to result from the Federal Circuit's decision are not just an inconvenience. They could mean lost connections and missed vital opportunities.

These pressing threats to minority and rural Americans present recurring, nationwide problems

that deserve the Court's attention, and provide additional reasons why Samsung's petition should be granted.

ARGUMENT

THE MEASURE OF DAMAGES APPLIED BELOW THREATENS TO IMPEDE THE SOCIAL AND ECONOMIC PROGRESS OF MINORITY, RURAL, AND LOW-INCOME AMERICANS.

The court of appeals' erroneous interpretation of 35 U.S.C. 289 will encourage more numerous—and absurdly excessive—design patent damage awards that will erase profits and threaten entire businesses. The threat posed by these total-profit disgorgement damages also will hand design-patent-holding companies a weapon so powerful that it threatens to distort markets in a variety of industries and exact tangible harms on the vulnerable communities *amici* represent.

A. The risk of excessive design patent damages imposes a special burden on entrepreneurs from minority and rural communities.

Samsung is correct that the "real losers" from the Federal Circuit's interpretation of Section 289 are likely to be "smaller enterprises, entrepreneurs and manufacturers" who must now face a world in which some minor design feature of their products could produce a judgment that forces them out of business. Pet. 38 (internal quotations omitted). This existential threat is even worse for entrepreneurs and small-business owners from minority and rural communities, because it compounds historic difficulties that

they have experienced in creating and developing businesses in this country.

If the Federal Circuit's interpretation of Section 289 is allowed to stand, design-patent holders will be able to extract extravagant sums for product designs that unwittingly stray too close to their own patented designs, even if no consumer could recognize the similarity.[2] Allowing total-profit disgorgement for infringement on minor design features will also allow more-established businesses (those with the means to patent their designs and enforce their rights) to scare potential competitors with unfair but credible disgorgement threats. The risks posed by such awards will discourage competitors from entering, or remaining in, markets where design patents are prevalent. And they will stifle the competitiveness of those who choose to stay.

Indeed, the anti-competitive effects accompanying design patent damages could be especially debilitating, because the possibility of an excessive disgorgement award is not a litigation risk that a company can internalize. Normally, companies guard against litigation risks by raising prices in the short term to create a buffer of cash to finance potential judgments over the long term. But when faced with a risk of total-profit disgorgement, charging more just means losing more. This will leave upstarts with little

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[2] To be clear, *amici* are not advocating for greater protection for either willful infringers or counterfeiters, who are rightly subject to severe penalties for their wrongdoing. *E.g.*, 35 U.S.C. 284 (providing enhanced damages for willful infringement); 18 U.S.C. 2320 (making it a federal crime to traffic in goods bearing counterfeits of registered marks). *Amici*'s sole concern is that legitimate competition should not be unduly hindered by fears of inadvertent infringement.

choice but to avoid competing against design-patent holders rather than bear the risk of a disgorgement penalty, which will make them far less vigorous competitors.[3]

Of course, the realm of patent creates an exclusive property right meant to protect the value of an inventor's contribution. Patent law is thus designed to deter some degree of competition—and necessarily so—but that exclusivity inevitably also breeds a degree of risk and uncertainty that sometimes over-deters. This is no mere idle speculation. Studies confirm that companies forced to work under threats from patent holders spend far less on research and development—regardless of the merits of those threats.[4] And in surveys, startup executives admit that litigation risks frequently force their firms to make substantial shifts in strategy or exit business lines entirely.[5] Threats of total-profit disgorgement awards will magnify these anti-competitive side-effects of patent protection to wildly excessive proportions. Design-patent holders will be able to leverage the resulting uncertainty to extract exorbitant sums, and frighten away competition, even if their

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[3] Tim Sparapani, *Stretched Too Far: Convoluted Design Patent Rules Empower Patent Trolls*, Forbes, December 3, 2015, http://www.forbes.com/sites/timsparapani/2015/12/03/stretched-too-far-convoluted-design-patent-rules-empower-patent-trolls/.

[4] Stephen Kiebzak et al., *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity* 3 (MIT Sloan Sch. of Mgmt., Working Paper No. 5095-14, 2015).

[5] Colleen Chien, *Startups and Patent Trolls*, 17 Stan. Tech. L. Rev. 461, 461-462 (2014); *see also* Robin Feldman, *Patent Demands and Startup Companies: The View from the Venture Capital Community* 49 (UC Hastings Research Paper No. 75, 2013).

infringement allegations are suspect. And this will unfairly hamper the ability of entrepreneurs to compete with design-patent holders in a manner that drastically exceeds what is necessary to protect a design-patent holder's inventive contribution.

These untoward effects of the Federal Circuit's erroneous ruling will be felt in a variety of industries. They may be most pronounced in design-heavy consumer electronics markets. But other industries will experience them too, including those in which design would not be expected to have an impact. This was amply illustrated in *Nordock, Inc. v. Systems, Inc.*, 803 F.3d 1344 (Fed. Cir. 2015). The product at issue in that case could not have been less design-intensive: a dock leveler that enables a smooth transfer of items from trucks onto loading docks. *Id.* at 1347. The patented design could not have been for a more utilitarian, less ornamental feature: the "lip and hinge plate" on the leveler. *Ibid.* And the manufacturer could not have been less cosmopolitan, operating from Malvern, Arkansas and Germantown, Wisconsin.[6] But the consequences were nevertheless excessively harmful to the business. The Federal Circuit, relying on the decision below in this case, rejected all attempts to limit the patent holder's recovery to profits actually attributable to the patented design, and held that the manufacturer should have been forced to disgorge all of its gains on the dock leveler. 803 F.3d at 1354-1355. This shows that the Federal Circuit's decision will not only have a significant anti-competitive impact, but also a dramatic reach, with significant consequences for minority and rural entrepreneurs.

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[6] See DLM, *Contact US*, http://www.dlminc.net/Contact-Us/.

Minority and rural entrepreneurs will be particularly hard-hit by the anti-competitive harms posed by the Federal Circuit's interpretation of Section 289 because of their vulnerable position in the American marketplace. Historically, minorities have found it harder to start and develop businesses than whites, because of inequalities in experience and education, access to financial capital, as well as lending and other types of discrimination.[7] Rural business development and employment have also lagged behind businesses in metropolitan markets, both because rural businesses are geographically distant from many commerce centers, and also because the poverty, poor health, and lack of education prevalent in rural areas place severe limitations on the available labor supply.[8]

Because of these difficulties, rural and minority-owned businesses tend to be smaller, fewer in number, and undercapitalized than the average.[9] Moreover, these communities were disproportionately affected by the economic downturn in 2007-2008, and have since

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[7] Robert W. Fairlie et al., U.S. Dep't of Commerce, Minority Bus. Dev. Agency, *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: the Troubling Reality of Capital Limitations Faced by MBEs* 13, 17-27 (2010) (*Troubling Reality*), http://people.ucsc.edu/~rfairlie/presentations/Disparities%20in%20Capital%20Access%20Report%202010.pdf.

[8] Council of Econ. Advisors, Exec. Office of the President, *Strengthening the Rural Economy – the Current State of Rural America* Section B (*Strengthening the Rural Economy*), https://www.whitehouse.gov/administration/eop/cea/factsheets-reports/strengthening-the-rural-economy/the-current-state-of-rural-america.

[9] *Troubling Reality* 9; Deborah Markley et al., RUPRI, *Access to Capital in Rural America: Supporting Business Startup, Growth and Job Creation in the Wake of the Great Recession, Interim Brief* 2 (Apr. 2012), http://www.rupri.org/Forms/Capital Markets_Briefing_April2012.pdf.

faced greater difficulty obtaining financing for new businesses.[10]

Accordingly, minority and rural entrepreneurs often find themselves as upstarts forced to compete against more-established businesses in a host of industries, uniquely dependent on open, competitive markets to succeed, and uniquely vulnerable to anti-competitive threats from more-established, design-patent-wielding rivals. The generally small size of rural and minority-owned businesses provide them little capacity to absorb a potential profit-disgorgement award. And the special difficulties these communities face in obtaining capital will make it harder for them to raise money to cover the increased design, research, and development costs needed to mitigate the risk of design infringement, which in turn will make it even harder for them to bring new products to market. Accordingly, threats of total-profit disgorgement will close markets to many entrepreneurs from minority and rural communities, leaving them with fewer opportunities for individual success, and depriving their communities of jobs and chances for advancement in the process.

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[10] *Troubling Reality* 18; VEDC, *Investing in the Success of African-American-Small Businesses: Recommendations for Increasing Access to Capital* 1 (Oct. 2015), https://www.jpmorganchase.com/content/dam/jpmorganchase/en/legacy/corporate/news/document/vedc-investing-in-success-of-aaosb.pdf; *Access to Capital in Rural America* 2.

B. The risk of total-profit disgorgement damages also threatens the affordability of Internet access for minority, rural, and low-income Americans.

The anti-competitive forces set in motion by the Federal Circuit's decision also threaten to make smartphones far more expensive, rendering it impossible for millions of low-income, minority and rural Americans to connect to the Internet.

1. Drastically excessive design-patent damage awards threaten to raise the cost of smartphones.

The risk of total-profit disgorgement awards created by the Federal Circuit's ruling will put significant cost pressures on the smartphone industry. The industry is already heavy with design patents, with nine of the top twenty design patent holders in the United States tied to the industry in some way.[11] The costs of producing smartphones are also notoriously high—laden with hefty research and development expenses, costs for exotic materials, and indeed, patent royalties that nearly match the cost of the hardware that goes into the phone. *Smartphone Royalty Stack*, note 11, *supra*, at 2. Accordingly, those in the smartphone industry generally face a greater risk of disgorgement threats than those in other industries, with less capacity to absorb those risks.

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[11] Ann Armstrong et al., *The Smartphone Royalty Stack: Surveying Royalty Demands for the Components Within Modern Smartphones* 67 (WilmerHale Working Paper, Apr. 2014) (*Smartphone Royalty Stack*), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/The-Smartphone-Royalty-Stack-Armstrong-Mueller-Syrett.pdf.

Some might downplay the risk of total profit disgorgement in smartphone designs on the basis that design patents are supposed to be limited to ornamental features that should in theory be easy to design around. But that is not likely to be the case in practice. Smartphone design options are already restricted because the available design space on a phone case is sharply limited, and the demands of function dictate that all phones will be roughly similar at their core. Design options are further crowded out by the proliferation of design patents in the smartphone industry, which leaves little room for design innovation. As a result, the design choices of even the most well-intentioned smartphone manufacturer will likely implicate several design patents that might colorably apply, which will make the risk of disgorgement harder to avoid than many would assume.

These significant risks are likely to lead to decreased competition in the industry, as firms hit with disgorgement judgments, or threats of disgorgement, are forced out of business, forced out of the industry, or simply forced to refrain from vigorously competing. These factors will reverse the incentives that have compelled manufacturers to provide more affordable offerings, and will discourage innovations that would otherwise further drive down prices in the future.[12] All this means higher prices for consumers.

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[12] See Scott Martin, *Consumers likely to feel impact of Apple defeat of Samsung*, USA Today, August 27, 2012, http://usatoday30.usatoday.com/tech/news/story/2012-08-25/apple-samsung-patent-trial-impact/57332198/1.

2. *Smartphones play a vital role in providing marginalized communities with Internet Access*

These price increases will make life harder for all who depend upon smartphones for Internet access, but will be devastating for many minority and rural consumers, who stand so much to gain from Internet access, and for whom smartphones provide the only affordable means of obtaining that access.

From the very beginning of the Internet, there have been stark, economic, racial, and geographic gaps between these who could get online and those who could not—disparities that persist today.[13] As the result of the high cost of Internet access, as well as cultural and language barriers that have inhibited adoption,[14] some 22 percent of African-Americans (representing 10.1 million people) and 19 percent of Hispanics (another 10.8 million people) today lack Internet access, as compared to only 15 percent of whites.[15] Rural Americans have faced similar problems obtaining Internet connections because their

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[13] U.S. Dep't of Commerce, *Falling Through the Net: a Survey of the "Have Nots" in Rural and Urban America* (Jul. 1995), https://www.ntia.doc.gov/ntiahome/fallingthru.html.

[14] James Prieger, *The Broadband Digital Divide and the Benefits of Mobile Broadband for Minorities* 7, 9 (Pepperdine Univ. Sch. of Pub. Policy, Working Paper No. 45, 2013).

[15] U.S. Census Bureau, *2014 National Population Projections: Summary Tables* Table 10, https://www.census.gov/population/projections/data/national/2014/summarytables.html (projecting that there are 46.1 million "blacks" in the United States, and 56.7 million Hispanics); Andrew Perrin et al., Pew Research Ctr., *Americans' Internet Access: 2000-2015* 10 (2015); (*Americans' Internet Access*), http://www.pewinternet.org/files/2015/06/2015-06-26_internet-usage-across-demographics-discover_FINAL.pdf

geographical isolation impedes access—being 10 percent less likely than urban residents to be without a means to go online. *Americans' Internet Access*, note 15, *supra*, at 10. The poor and uneducated also are far less likely than the average to use the Internet or own a smartphone. *Id.* at 6.

This inability to access the Internet inhibits the upward mobility of many in minority and rural communities. Americans without ready Internet access find themselves effectively shut out of the many job openings that now require online applications.[16] And more generally, Internet exclusion prevents people from efficiently accessing information, participating in civic society, and communicating with others. The absence of Internet access thus is associated with persistent decreased social and economic mobility and diminished quality of life.[17]

While Internet exclusion hurts all unconnected Americans, it "compounds inequalities for historically marginalized groups."[18] The inability to connect to the Internet exacerbates effects of centuries of discrimination and cultural barriers that have left minorities unequal in virtually every facet of American life,

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(estimating that in 2015, 22 percent of blacks and 19 percent of Hispanics do not use the Internet).

[16] HUD, *Understanding the Broadband Access Gap*, PDR Edge, https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_100614.html.

[17] See Lisa M. Coleman, *Creating a Path to Universal Access: The FCC's Network Neutrality Rules, the Digital Divide, & the Human Right to Participate in Cultural Life*, 30 Temp. J. Sci., Tech. & Envt'l L. 33, 49-50 (2011).

[18] FCC, *Connecting America: the National Broadband Plan* 129 (2011), https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

including education, health, commerce, and political involvement.[19] And it reinforces the geographic isolation that poses socioeconomic, health, and educational problems for rural Americans not experienced by their urban and suburban peers. *Strengthening the Rural Economy*, note 8, *supra*.

These groups are beginning to make strides in obtaining the life-altering benefits of Internet access. Most minority groups, including African-Americans and Hispanics, are adopting broadband Internet at a pace well above the national average, a growth that is entirely attributable to smartphone ownership.[20] Now a higher proportion of both African-Americans (70 percent) and Hispanics (71 percent) own smartphones phones than whites (61 percent).[21] And minorities often forego wired connections entirely in favor of smartphones, in rates much higher than the average person.[22]

Smartphone adoption has improved the social, economic, and political lives of minorities, providing

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[19] Devah Pager et al., *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 Ann. Rev. Sociology 181, 186-193, 197-200 (2008).

[20] U.S. Dep't of Commerce, Nat'l Telecomm. & Info. Admin., *Digital Nation: Expanding Internet Usage* 11 (Feb. 2011) (*Expanding Internet Usage*), https://www.ntia.doc.gov/files/ntia/publications/ntia_internet_use_report_february_2011.pdf.

[21] Aaron Smith, Pew Research Ctr., *U.S. Smartphone Use in 2015* 13 (2015) (*U.S. Smartphone Use in 2015*), http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf.

[22] John B. Horrigan et al., Pew Research Ctr., *Home Broadband 2015* 32 (Dec. 12, 2014) (*Home Broadband 2015*), http://www.pewinternet.org/files/2015/12/Broadband-adoption-full.pdf.

them avenues to further educational attainment,[23] vital health resources for these underserved communities,[24] better business and employment opportunities,[25] and deeper social access and integration, *Hispanic Broadband Access*, note 24, *supra*, at 2.

Rural Americans have also begun to overcome their geographic isolation through mobile Internet access. Although rural Americans have been slower in adopting smartphones than those in suburban and urban areas, those who do purchase a smartphone are just as likely as those in urban areas to use it as their sole source of Internet access. *Ibid.*; *U.S. Smartphone Use in 2015*, note 21, *supra*, at 15. This has given rural communities access to mobile applications that provide enriching educational opportunities[26] and

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[23] Prieger 18 (noting that African-Americans especially have benefitted from online educational resources, being significantly more likely than average to take online classes).

[24] The Hispanic Inst., *Hispanic Broadband Access: Making the Most of the Mobile, Connected Future*, Mobile Future 13 (July 2012) (*Hispanic Broadband Access*) (noting that online health resources have proven uniquely important for minorities, who suffer higher-than-average rates of diabetes, obesity, and cardiovascular disease), http://mobilefuture.org/wp-content/uploads/2013/03/mobile-future.publications.hispanic-broadband-access.pdf.

[25] Aaron Smith, Pew Research Ctr., *Searching for Work in the Digital Era* 10, 17 (Nov. 19, 2015), http://www.pewinternet.org/files/2015/11/PI_2015-11-19-Internet-and-Job-Seeking_FINAL.pdf (noting that minorities are more likely than average to use the Internet to search for and apply to jobs online, and to use a smartphone as part of that job search).

[26] *E.g.*, ConnectEd Initiative, Exec. Office of the President, https://www.whitehouse.gov/issues/education/k-12/connected (detailing the President's initiative to bring mobile learning to rural school districts).

allow visits with doctors in far-away cities.[27] Perhaps more importantly, mobile applications promote the development of rural businesses, keeping farmers up to date on weather conditions and crop prices, and allowing geographically isolated rural businesses to tap into global markets from the palms of their hands.[28]

Vitally, these gains have been greatest for the least well-off in these historically marginalized communities, because low-income and uneducated Americans are far more likely to rely exclusively on a smartphone for Internet access than the average person. *U.S. Smartphone Use in 2015*, note 21, *supra*, at 3, 18. Indeed, low-income buyers are currently the fastest growing segment of the smartphone market.[29]

3. Increasing smartphone prices will make Internet access prohibitively expensive for millions in these marginalized communities.

Increased smartphone prices present a threat to these gains and an obstacle to further progress in

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[27] Clara Ritger, *How Mobile Apps Could Transform Rural Health Care*, Nat'l Journal, Nov. 11, 2013.

[28] Gordon Arbuckle Jr., Iowa State Univ. Extension & Outreach, *Iowa State Survey Shows Farmers Using Information Technology for Decision-making* (Sept. 23, 2015), http://www.extension.iastate.edu/article/iowa-state-survey-shows-farmers-using-information-technology-decision-making.

[29] NPD Group, *U.S. Smartphone Sales among Consumers Earning Less than $30,000 Grow More Than 50 Percent, According to the NPD Group* (Apr. 15, 2015), https://www.npd.com/wps/portal/npd/us/news/pressreleases/2015/us-smartphone-sales-among-consumers-earning-less-than-30000-grow-more-than-50-percent-according-to-the-npd-group/.

Internet adoption for the communities *amici* represent.

The predominant reason minority, rural, and low-income populations turn to smartphones for Internet access is that mobile Internet is usually far less expensive than a wired broadband connection. Smartphones can be purchased at many locations for under $100, much cheaper than the hefty price of a home computer.[30] And mobile broadband plans usually cost far less than their fixed broadband counterparts.[31] Affordable smartphones therefore enable Internet access for those who might not otherwise be able to afford it.

That said, many who currently rely on smartphones for Internet access can barely afford it, making their connection to the Internet extremely tenuous.[32] Cost is also the leading reason that currently unconnected minority and rural Americans cite for being unable to connect to the Internet. *Expanding Internet Usage*, note 25, *supra*, at 5. Accordingly, price increases brought about as the result of grossly excessive design-patent damages will make Internet access too expensive for many current adopters, and will put the

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[30] Lynette Holloway, *Apple vs. Samsung: Could Ruling Widen Digital Divide?*, NewsOne, 2014, http://newsone.com/3004430/apple-vs-samsung/.

[31] Nick Russo et al., *Open Technology Institute, The Cost of Connectivity 2014* 14, 21 (2014), https://www.newamerica.org/oti/the-cost-of-connectivity-2014/.

[32] *U.S. Smartphone Use in 2015* 6 (relating that nearly half of those who depend upon smartphones for Internet access have had to cancel their service, and 75 percent "frequently" or "occasionally" reach their data caps).

Internet further out of reach for those who have not yet connected.

In sum, the Federal Circuit's interpretation of Section 289 harms entrepreneurs from minority and rural communities by inhibiting the potential success of their developing businesses. It also harms the consumers and citizens of these communities, pricing them out of the only affordable means of obtaining the essential benefits of Internet access. This case thus presents pressing, nationwide problems warranting this Court's attention.

CONCLUSION

The petition should be granted and the judgment of the court of appeals should be reversed.

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